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IN THE COURT OF APPEALS OF INDIANA

DAVID W. BREDEMEIER,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 26A05-0712-CR-685
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE GIBSON SUPERIOR COURT
The Honorable Earl G. Penrod, Judge
Cause No. 26D01-0703-FD-29

June 11, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

David Bredemeier appeals his convictions and four-year sentence for Class D felony theft, Class D felony possession of anhydrous ammonia, Class A misdemeanor resisting law enforcement, Class A misdemeanor trespass, and Class A misdemeanor illegal storage or transportation of anhydrous ammonia. We affirm.

Issues

Bredemeier raises two issues:

I. whether sufficient evidence was presented to support his convictions; and

II. whether the trial court properly sentenced him.

Facts

The evidence most favorable to the convictions is that on March 8, 2007, police officers in conducted surveillance of a Co-Op in Haubstadt because there had been recent thefts of anhydrous ammonia in the area. Roger Leister, town marshal of Owensville, and Darrell Parker, deputy town marshall of Fort Branch, hid behind farm machinery. They observed a vehicle enter the Co-Op and a person run from the vehicle toward the ammonia tanks. Officer Parker then used to his cell phone to advise the Haubstadt town marshall that they would need assistance. Two men approached the area where the officers were hiding. The officers drew their weapons, confronted the men, and ordered them to stop. Officer Leister shined his flashflight on Bredemeier's face and saw him set down a tank. He was three to four feet from Bredemeier at the time. Bredemeier took off running and Officer Leister followed. Officer Leister found Bredemeier lying in low

grass, but when he shined his flashlight on him and ordered him to put up his hands, Bredemeier ran into a wooded area. Eventually, an officer with a canine arrived on the scene, but after over two hours of searching, they did not find the suspects.

Meanwhile, the tank set down by Bredemeier remained in its position. Officers believed it would not be safe to transport the tank due to the potential volatility of the chemicals inside. Another officer took the tank to the center of a field and shot a hole in it to release the ammonia. No chemical tests were performed on the tank or the substance to confirm its contents, but officers on the scene observed a low white cloud with a strong ammonia smell.

Later that night, another officer stopped a vehicle matching the description of the one that dropped the men off and arrested the driver, Vicki Buckboro, pursuant to an outstanding warrant. She initially only told officers that Eddie Grisham was in her car and would not give the name of the other person. She instead told them the other person was listed as "W" in her cell phone, and that number reached a voice mail for Bredemeier.[1] An officer on the scene pulled up a photograph of Bredemeider on his cruiser's computer and Officer Leister identified Bredemeier as the person he had been chasing.

On March 12, 2007, the State charged Bredemeier with Class D felony theft, Class D felony possession of anhydrous ammonia, Class A misdemeanor resisting law enforcement, Class A misdemeanor trespass, and Class A misdemeanor illegal storage or

[1] According to the testimony of his friends, Bredemeier's nickname was "Wop." Tr. p. 209.

transportation of anhydrous ammonia. A jury found Bredemeier guilty of all charges on September 18, 2007. The trial court sentenced him to eighteen months each for the theft and possession of anhydrous ammonia convictions, to be served consecutively. The trial court sentenced him to another 360 days for the resisting law enforcement conviction, to be served consecutively. Two concurrent 360-day sentences were also imposed for the remaining Class A misdemeanor convictions, for a total sentence of four years. This appeal followed.

Analysis

I. Sufficiency

When reviewing the sufficiency of the evidence to support a conviction, we must consider only the probative evidence and reasonable inferences supporting the verdict. Drane v. State, 867 N.E.2d 144, 146 (Ind. 2007). It is the role of the fact-finder, not this court, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. Id. We will affirm the conviction unless no reasonable fact-finder could have found the elements of the crime proven beyond a reasonable doubt. Id. It is not necessary that the evidence overcome every reasonable hypothesis of innocence. Id. at 147. The evidence is sufficient if an inference may reasonably be drawn from it to support the conviction. Id.

Bredemeier argues that Officer Leister's identification of him was "impermissibly suggestive." Appellant's Br. p. 9. He contends that because neither officer managed to get a lengthy look at the suspects that night, admitted the face-to-face confrontation was brief, and viewed only a single photograph, that the identification process was suspect.

Although the officers did admit being unable to recall the specific clothing the suspects were wearing, they did testify that they saw their faces. "We were close enough to see their face . . . and their facial expressions." Tr. p. 44.

Eyewitness identification by a single witness is sufficient to support a conviction. Stowers v. State, 657 N.E.2d 194, 200 (Ind. Ct. App. 1995), trans. denied. Any inconsistencies in identification testimony go only to the weight of that testimony, as it is the task of the jury to weigh the evidence and determine the credibility of the witnesses. Badelle v. State, 754 N.E.2d 510, 543 (Ind. Ct. App. 2001) (citing Emerson v. State, 724 N.E.2d 605, 609-10 (Ind. 2000)), trans. denied. Officer Parker made an in-court identification of Bredemeier. Officer Leister identified a picture of Bredemeier on the scene and also made an in-court identification of Bredemeier. He testified that "there was no doubt in my mind" Bredemeier was the person he saw that night. Tr. p. 44. At the scene that night, Vicki Buckburo revealed that she dropped a man at the Co-Op that was listed as one of her cell phone contacts, a number that went to Bredemeier's voicemail. The jury clearly chose to disbelieve Bredemeier and his alibi witness, and it is not our role to reconsider the credibility of that testimony. We also note that cross-examination revealed inconsistencies in that testimony and credibility issues with those testifying.

Even if the identification is deemed sufficient, Bredemeier argues that there is not sufficient evidence that the substance in the portable tank was actually anhydrous ammonia. Neither the substance inside the tank nor the tank itself was tested to confirm the presence of ammonia. The officers' testimony, however, indicated that they were

familiar with anhydrous ammonia and that they were sure it was the substance expelled from the tank. Officer Parker testified he was familiar with anhydrous ammonia and had seen clouds of it. He recognized not only the look of the white cloud, but also the smell and the burning sensation. Officer Leister testified that upon its release the substance in the tank formed a white cloud that was low to the ground, with a strong smell. The frost on the tank also indicated the presence of anhydrous ammonia.

Bredemeier argues that there is no physical evidence linking him to the tank, since the tank was not fingerprinted.[2] "Mere presence at the crime scene is insufficient proof to support a conviction, but presence at the scene coupled with other circumstances tending to show participation in the crime may be sufficient to sustain a guilty verdict." Rohr v. State, 866 N.E.2d 242, 248-49 (Ind. 2007). Circumstantial evidence is sufficient if it allows for reasonable inferences enabling the fact-finder to determine guilt beyond a reasonable doubt. Id. at 249. Buckboro testified that she had driven Eddie Grisham and Bredemeider to the Co-Op and dropped them off that night. Officers not only identified Bredemeier as present at this crime scene, but also identified Bredemeier as the individual who set the tank on the ground before running from police. Sufficient evidence existed to support the convictions.

II. Sentence

We engage in a four-step process when evaluating a sentence under the current "advisory" sentencing scheme. Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007).

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[2] Officers testified that they did not fingerprint the tank because the steel frosted.

First, a trial court must issue a sentencing statement that includes "reasonably detailed reasons or circumstances for imposing a particular sentence." Id. Second, the reasons or omission of reasons given for choosing a sentence are reviewable on appeal for an abuse of discretion. Id. Third, the weight given to those reasons, i.e. to particular aggravators or mitigators, is not subject to appellate review. Id. Fourth, the merits of a particular sentence are reviewable on appeal for appropriateness under Indiana Appellate Rule 7(B). Id.

Bredemeier argues that the trial court failed to properly assign and weigh two mitigating factors in sentencing him. We will examine a potential omission of a mitigating factor for an abuse of discretion, but the weight assigned by the trial court is not reviewed on appeal. Anglemyer, 868 N.E.2d at 491. The two mitigating factors that Bredemeier alleges the trial court improperly omitted from consideration are that the crime did not cause or threaten harm to persons or property and that the crime was a result of circumstances unlikely to re-occur. See Ind. Code § 35-38-1-7.1(b)(1) & (2).

The transcript of the sentencing hearing reveals that the trial court considered the fact that the crime did not involve injury or property damage. "[A]t least in these crimes there was nobody hurt and then that there was no property damage. So to the extent that would be true, I suppose that would be to your credit." Tr. pp. 18-19. But the trial court added the potential for harm was great when dealing with the volatile compounds involved in the making of methamphetamine and concluded that "while I would agree that no one was actually hurt and there was no specific property damage and that would be to your credit, those mitigating factors are lessened by the fact that there was

incredible potential harm in what your were doing on that occasion and what you've been convicted of here." Id. at 19-20.

The trial court did not overlook the fact that Bredemeier's mother was terminally ill, contrary to his argument. It acknowledged this fact, but after considering the history of the illness, concluded that "it was a rather modest mitigator." Id. at 20. After considering these mitigators, the trial court discussed Bredemeier's lengthy criminal history. His history includes felony drug convictions in Illinois and felony convictions in Kentucky. Bredemeier's Indiana history includes convictions for theft, a conviction for possession of controlled substance, dealing in cocaine, attempted burglary, and pending charges for possession of a controlled substance and invasion of privacy. He was on parole at the time of the instant offenses. The trial court found the criminal history aggravator outweighed the mitgators and imposed a total sentence of four years.

The parties agreed during sentencing that the statutory maximum allowable sentence would be four years. See I.C. § 35-50-1-2 (for a single episode of criminal conduct without crimes of violence, the trial court is limited to the advisory sentence for one class of felony higher than the highest convicted felony). That is the sentence Bredemeier received and the trial court did not abuse its discretion in assigning it.

Bredemeier also implies that the maximum sentence available was inappropriate. We assess whether a sentence is inappropriate under Indiana Appellate Rule 7(B) in light of his character and the nature of the offenses. Although Rule 7(B) does not require us to be "extremely" deferential to a trial court's sentencing decision, we still must give due consideration to that decision. Rutherford v. State, 866 N.E.2d 867, 873 (Ind. Ct. App.

2007). We also understand and recognize the unique perspective a trial court brings to its sentencing decisions. Id. "Additionally, a defendant bears the burden of persuading the appellate court that his or her sentence is inappropriate." Id.

Regarding the nature of the offense, Bredemeier and his accomplice created a situation where rural officers had to call in additional resources for a lengthy middle-of-the-night manhunt. Although nothing immediately dangerous happened here, we acknowledge the testimony of the Co-Op manager explaining the inherent risks presented to first responders, the surrounding community, and the trespassers themselves of improperly transferring and transporting anhydrous ammonia. Given these inherent dangers, we cannot conclude the nature of this offense warrants a reduction to the sentence. Bredemeier's lengthy criminal history and the failures of prior efforts at rehabilitation indicate a weakness of character that does not warrant a reduction to the sentence. Bredemeier has not convinced us that his sentence is inappropriate.

Conclusion

Sufficient evidence existed to support Bredemeier's convictions. The trial court did not abuse its discretion in sentencing him, and the four-year sentence is appropriate. We affirm.

Affirmed.

CRONE, J., and BRADFORD, J., concur.